

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ETTA FANNING,

Plaintiff,

VS.

CITY OF SHAVANO PARK, TEXAS,

Defendant.

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Civil Action No. 5:18-cv-0803-XR

**DEFENDANT CITY OF SHAVANO PARK'S RESPONSE IN OPPOSITION TO
PLAINTIFF'S MOTION TO ALTER OR AMEND JUDGMENT**

TO THE HONORABLE UNITED STATES DISTRICT JUDGE XAVIER RODRIGUEZ:

NOW COMES the **CITY OF SHAVANO PARK**, Defendant in the above entitled and numbered cause, and files this its Response in Opposition to Plaintiff's Rule 59(e) Motion to Alter or Amend Judgment and would respectfully show unto the Court the following:

I.

This Honorable Court entered Judgment on December 19, 2019 [ECF Doc. No. 44] granting Defendant City of Shavano Park's Motion for Summary Judgment. Plaintiff has filed an Opposed Motion to Alter or Amend the Court's Judgment pursuant to F.R.C.P. 59(e). Defendant City of Shavano Park asserts that Plaintiff's Motion should be in all things denied.

II.

Defendant **CITY OF SHAVANO PARK** asserts unto the Court that a Rule 59(e) Motion "*calls into question the correctness of a Judgment.*" ***Templet v. Hydrochem, Inc.***, 367 F.3d 473, 478 (5th Cir. 2004). Rule 59 serves a narrow purpose, a motion to alter or amend under Rule 59(e) must clearly establish either a manifest error of law or fact or must present newly discovered evidence and cannot be used to raise arguments which could, and should have been made before the

judgment issued. *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 863 (5th Cir. 2003). In exercising its discretion, a district court must strike the proper balance between the need for finality and the need to render just decisions on the basis of all the facts. *Hale v. Tonwnley*, 45 F.3d 914, 921 (5th Cir. 1995).

III.

The CITY OF SHAVANO PARK embodies beauty and aesthetics in its slogan “*City Living with Country Charm.*” The City of Shavano Park has detailed its interests in the codes purpose section to its ordinance which lays out six specific objectives. Code Section 24-1. This Court has recognized an interest in aesthetics qualifies as a “substantial governmental interest” *Reagan National Advertising of Austin, Inc. v. City of Cedar Park*, 387 F.Supp.3d 703, 714 (W.D. Tex. 2019), (reconsideration denied, No. AU-17-CA-00717-SS, 2019 WL 3845455 W.D. Tex. Aug. 15, 2019).

Defendant City of Shavano Park acknowledges that no Fifth Circuit case has held that aesthetics as a compelling governmental interest since *Reed* was decided. However, in the commercial context, the Court in *Architecture Heart, LLC. v. City of San Diego*, 231 F.Supp.3d 828 (S.D. Calif. 2017), held that the City of San Diego’s mural ordinance based on aesthetics furthered a compelling governmental interest and was sufficiently tailored to accomplish that interest. *Id.* at 840.

Defendant City of Shavano Park asserts that the City of Shavano Park banner sign ordinance in further of the aesthetics of the community does not violate the First Amendment, as a matter of law.

WHEREFORE, PREMISES CONSIDERED Defendant CITY OF SHAVANO PARK prays that the Court deny Plaintiff’s Motion to Alter or Amend Judgment and for such other and further relief as it may show itself justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Defendant City of Shavano Park's Response in Opposition to Plaintiff's Motion to Alter or Amend Judgment filed via CM/ECF has been forwarded on this the 28th day of January, 2020 via the CM/ECF system to the following:

Mr. Jerad Wayne Najvar
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Via Email: jerad@najvarlaw.com

//s// Charles S. Frigerio

CHARLES S. FRIGERIO